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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE, Plaintiff and Respondent, v. ADAM WAYNE COOK, Defendant and Appellant.	C070707 (Super. Ct. No. T100554F)

Following a jury trial, defendant Adam Wayne Cook was convicted of six counts of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))[1] and two counts of criminal threats (§ 422), with an enhancement for personal use of a deadly weapon (§ 12022, subd. (b)(1)). Defendant admitted three prior prison term allegations (§ 667.5, subd. (b)), and the trial court sentenced him to 11 years four months in state prison.

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[1] Subsequent undesignated statutory references are to the Penal Code.

On appeal, defendant contends there is insufficient evidence to support one of the assault by means likely to produce great bodily injury counts, and numerous sentencing errors require a remand for resentencing. We reverse the sentence and remand for resentencing.

FACTS

On July 25, 2010, Gary Beldner and Wendy Tannehill went camping together in Nevada County. They met defendant and his wife Tonya Edwards at the campground. Edwards approached Beldner's campsite and asked if they could transport her from the camp because she was afraid for her life. While this made Beldner "uncomfortable," no action was taken that night.

The next morning, Tannehill suggested a "whiskey" run; she had consumed a pint of whiskey that morning and was now out of alcohol. Later, Beldner drove Tannehill, Edwards, and defendant to Truckee to buy a fifth of whiskey. All four campers sat together on the front bench seat of Beldner's truck. Beldner saw Edwards and Tannehill kissing each other during the trip; he testified that defendant gave Edwards permission to kiss Tannehill.

The two couples returned to their respective camps. Later, Edwards approached Beldner's campsite and said that his and Tannehill's "lives were in danger" because defendant "was going to kill people." Beldner got Edwards and Tannehill into his truck and drove off.

After taking a wrong turn, Beldner drove back toward the camp, outside the entrance. Defendant drove up to them in his truck, exiting with a hatchet in his hand.[2] From 20 to 30 feet away, defendant pointed his hatchet at Beldner and threatened to kill him. Defendant then moved toward Tannehill and Edwards, who were standing outside

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[2] According to Tannehill, defendant's assault happened at the campsite before the three initially entered Beldner's truck.

the cab of Beldner's truck, and started swinging the hatchet at them. Defendant swung the hatchet about six times at the women, who dodged the blows while pleading with defendant to stop. Beldner drove off with Tannehill and Edwards after they got into his truck.

Defendant followed them in his truck, repeatedly ramming Beldner's truck from behind. Beldner eventually drove to a gas station, where defendant rammed his truck into the side of Beldner's truck, causing it to spin around. Beldner was able to keep control of his truck and drive off to the freeway, where defendant did not follow. Beldner eventually called the police from a Caltrans yard.

Testifying for the prosecution, Edwards could not recall defendant's assaulting them with a hatchet or his ramming Beldner's truck. Edwards told a Placer County Sherriff's deputy that defendant "picked up an ax" and "just started swinging it at all three of them." She followed Beldner and Tannehill into Beldner's truck to escape defendant. Defendant chased them in his truck, "spinning donuts" around Beldner's truck but never hitting it. She told another deputy that defendant, wielding a hatchet, said he was going to "kill [her]," causing her to fear for her safety.

The second deputy testified that paint from defendant's truck transferred to the trailer ball of Beldner's truck, and that dents on defendant's truck corresponded to the height and dimensions of the trailer ball.

Testifying for the defense, Edwards said that on the morning of the incident, Beldner and Tannehill offered her pills, which she accepted. She swallowed two of the pills, and she, Beldner, and Tannehill crushed and snorted others.

Defendant testified that he and Edwards met Tannehill and Beldner at the campsite on the day before the incident. He let Edwards go to the store with them; when she returned, she told defendant they had given pills to her. Later, Tannehill kept "coming-on" to Edwards and "grabbing all over [her]." He also saw Beldner, Edwards, and Tannehill snorting pills.

The four drove to Truckee to buy alcohol. On the return trip, defendant saw Edwards, who was "pretty wasted," on the floor of the truck with her shorts and underwear pulled to the side while Tannehill performed oral sex on her. When they got back to camp, defendant announced he and Edwards were returning to their campsite and the others should leave them alone.

Defendant left his wife, who was too intoxicated to walk, on a picnic bench and jumped into the water to clean himself. When he returned, he found she was gone, and he could not locate Beldner, Tannehill, or Beldner's truck. Concerned, defendant drove from the campsite in his truck, which contained a hatchet and other camping equipment. Defendant's truck was old and had a "mashed in" front bumper.

Defendant found Beldner's truck parked by the side of the road. Believing Beldner and Tannehill were going to rape and kill Edwards, defendant left his truck and took his hatchet. Defendant told Beldner and Tannehill to get their hands off of Edwards. Tannehill approached, swore at him, and slapped him in the face. Defendant then put the hatchet back in his vehicle; he never swung the hatchet or threatened anyone. He returned to the campsite to find a phone so he could call 911. He could not find a phone but saw Beldner's truck heading toward the main road, so defendant followed it to the gas station. He avoided contact with Beldner's truck but did crash into the gas station.

Defendant then walked back to the campsite, where he stayed for the evening. He never reported the incident, although he believed Edwards had done so.

DISCUSSION

I

Defendant contends there is insufficient evidence to support his conviction for assault by means likely to produce great bodily injury by a hatchet on Beldner (count I). We disagree.

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine

whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)

A conviction for violating section 245, subdivision (a)(1) requires proof that the defendant (1) willfully committed an unlawful act that by its nature would probably and directly result in the application of physical force on another person; (2) was aware of facts that would lead a reasonable person to realize that as a direct, natural, and probable result of this act, physical force would be applied to another person; (3) had the present ability to apply physical force to the person of another; and (4) committed the assault by means of force likely to produce great bodily injury or used a deadly weapon in the assault. (CALCRIM No. 875.)

Defendant contends there is insufficient evidence to show he did any act that would likely result in physical harm to Beldner. Noting that "[o]rdinarily, '[a]n assault occurs whenever " '[t]he next movement would, at least to all appearance, complete the battery[,]' " [[c]itation[]]' [citation]" (*People v. Page* (2004) 123 Cal.App.4th 1466, 1473), defendant asserts he was too far away from Beldner to have attained the ability "to strike immediately at his intended victim" (*People v. Valdez* (1985) 175 Cal.App.3d 103, 112).

As the California Supreme Court explained, " 'Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, *any other similar act*, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of *using actual violence* against the person of another, will be considered an assault.' [Citations.]" (*People v. Colantuono* (1994) 7 Cal.4th 206, 219.)

According to Beldner's testimony, defendant was 20 to 30 feet away from him when he held the hatchet parallel to the ground with his arm straight out, pointed the blade straight toward Beldner, and said he "wanted to fucking kill [him]." He then

walked toward Tannehill and Edwards and swung the hatchet at them, forcing the women to take evasive action before they got into Beldner's car and escaped with Beldner.

Throwing an axe or hatchet at a person constitutes an assault under section 245, subdivision (a)(1). (Cf. *People v. McGahuey* (1981) 121 Cal.App.3d 524, 528-529 [defendant broke into house, stole hatchet, and threw hatchet at the resident to prevent her from calling police; section 654 did not prevent punishment for burglary and assault with a deadly weapon].) A jury could reasonably infer defendant was within range to throw the hatchet at Beldner, providing the means to presently carry out defendant's threat to harm him. In addition, "[i]t is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self defense or retreat, the assault is complete." (*People v. Yslas* (1865) 27 Cal. 630, 634.) The jury could reasonably conclude that but for Beldner's decision to escape with Edwards and Tannehill, defendant would have continued his attack, which would have included Beldner as defendant reached him.

Substantial evidence supports the jury's verdict of guilty on count I.

II

Identifying errors in sentencing and the abstract, defendant asks us to vacate the sentence and remand for resentencing. The Attorney General agrees regarding the errors, but suggests we should modify the sentence rather than vacate and remand for resentencing.

Defendant was convicted of six counts of assault by means likely to produce great bodily injury—against Beldner (counts I and VI), Edwards (counts III and VII), and Tannehill (counts IV and VIII)—and two counts of criminal threats—against Beldner (count II) and Tannehill (count V); a personal use of a deadly weapon allegation was found true on count V. Defendant also admitted three prior prison term allegations.

The trial court sentenced defendant as follows: three years on count I, the principal term; a stayed term of two years on count II (§ 654); a consecutive one-year term on count III; a stayed eight-month term on count IV (§ 654); a stayed one-year term on count V (§ 654); a consecutive eight-month term and a consecutive one-year term for the section 12022, subdivision (b)(1) enhancement on count VI; a consecutive one-year term on count VII; a concurrent one-year term on count VIII; a consecutive one-year term for count IX; and three consecutive one-year terms for the prior prison term allegations. The trial court stated this sentence totaled 128 months. According to the abstract of judgment, which does not reflect the section 12022, subdivision (b)(1) enhancement, the total sentence is 11 years four months.

The trial court made various misstatements in pronouncing the sentence. As to count IV, it imposed a stayed eight-month term for what it called "the 4022 [*sic*] criminal threats with respect to Ms. Edwards." Defendant was never charged with and therefore never convicted of making criminal threats against Edwards. The charge the trial court referred to, count IV, charged defendant with assaulting Tannehill with a hatchet. This led the trial court to misname and incorrectly number two other counts following count IV. The court called count VI "criminal threats with respect to Wendy Tannehill." Count VI in fact charged defendant with assaulting Beldner with his car, while the charge of criminal threats against Tannehill was made in count V. In addition, the trial court sentenced defendant for count IX, what it termed assault against Tannehill with a car. This too is wrong as there is no count IX; the assault on Tannehill with defendant's vehicle was charged in count VIII.

The trial court committed two errors regarding the count for criminal threats against Tannehill. The court imposed a consecutive eight-month term (one-third the middle term of 24 months) for the criminal threats count and a consecutive one-year term for what it called a section 1192.7, subdivision (c) enhancement. There is no enhancement in section 1192.7, subdivision (c), which lists the serious felonies. Rather,

defendant's conviction for criminal threats against Tannehill was subject to section 12022, subdivision (b)(1) for personally using a dangerous weapon, the hatchet. The trial court also erred in the one-year sentence it imposed for the enhancement. Since the enhancement was attached to a subordinate term, the criminal threats conviction, the trial court should have imposed one-third of the one-year term for the enhancement, a consecutive four-month term. (§§ 12022, subd. (b)(1), 1170.1, subd. (a).)

There is also an error in the sentence for count VIII, in which the trial court imposed "one-third the midterm 12 months concurrent[.]" Section 1170.1 requires the trial court to impose one-third the middle term when imposing *consecutive* sentences for subordinate offenses. (§ 1170.1, subd. (a).) Concurrent sentences are imposed for the full term. A "concurrent one-third term" is not possible under California law, and we shall not try to discern whether the trial court intended to impose a concurrent or consecutive term on this count.[3]

We disagree with defendant's assertion that the trial court made an arithmetic error in imposing sentence. Defendant asserts the sentence actually imposed by the trial court adds up to 11 years eight months rather than the 128 months the court intended to impose. Defendant is wrong. The sum of the consecutive terms imposed by the trial court equals 128 months, or 10 years eight months.[4]

The Attorney General suggests we modify the sentence as the trial court's intended sentence can be inferred from what it pronounced. Defendant asks us to vacate the sentence and remand for resentencing with the direction that the trial court shall not

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[3] The clerk's minutes and the abstract of judgment reflect the same error, making it unlikely that this was a transcription error by the court reporter.

[4] Three years (count I) + one year (count III) + eight months and one year (count VI and the enhancement) + one year (count VII) + one year (count IX) + one year plus one year plus one year (prior prison terms) = 10 years eight months.

impose a term greater than 10 years eight months. Since we do not know whether the trial court intended to impose a concurrent or consecutive term on one of the counts, we shall vacate the sentence and remand for resentencing.

Defendant's contention regarding the maximum term on resentencing is based on the California Constitution's prohibition against double jeopardy. (See *People v. Hanson* (2000) 23 Cal.4th 355, 357 ["When a defendant successfully appeals a criminal conviction, California's constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing"].) When a sentence is vacated for sentencing error and remanded for resentencing, the trial court can impose a greater sentence than the original if the sentence was unauthorized, but cannot impose a greater sentence if the original sentence was simply incorrect or erroneous for some other reason, such as a violation of section 654. (*People v. Nick* (1985) 164 Cal.App.3d 141, 145.)

The problem with defendant's argument is that we do not know the precise sentence intended by the trial court. While the pronounced sentence of 10 years eight months is consistent with the terms imposed by the trial court, this assumes the court intended to impose a concurrent rather than consecutive term on one of the section 245, subdivision (a)(1) counts involving the assault with defendant's vehicle. As previously discussed, we are unwilling to make that assumption.

Eight months of the sentence imposed by the trial court was unauthorized, as the section 12022, subdivision (b)(1) enhancement should have been four months rather than one year. Subtracting eight months from the court's announced sentence of 10 years eight months leaves a 10-year sentence. However, if the court intended to impose a consecutive rather than concurrent term on count VIII, then the court in fact intended to impose an 11-year term (correcting for the erroneous one-year enhancement), and the sentence in fact imposed was the product of miscalculation. Since 11 years is the longest authorized term the trial court could have imposed, that is the longest term it can impose on remand.

DISPOSITION

The sentence is vacated and remanded for resentencing in accordance with this opinion. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

MAURO, J.